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THIRD REPORT ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

by

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INTRODUCTION

1. The Special Rapporteur has so far submitted two reports to the Commission, namely, the preliminary report (A/CN.4/415 and Corr.1 and 2) to the fortieth session and the second report (A/CN.4/222 and Corr.1 and Add.1 and Corr.1) to the forty-first sesssion. At the 2122nd meeting of the Commission, at its forty-first session, the Commission decided to refer articles 1 to 11 bis to the Drafting Committee together with the proposals made by the Special Rapporteur as well as those made by other members. As regards draft articles 12 to 28, the Commission decided to give further consideration to them at its forty-second session. Pursuant to the above decisions and taking into account the views expressed in the Sixth Committee at the forty-fourth session of the General Assembly, the Special Rapporteur has prepared the third report and submits it to the Commission with a view to assisting the consideration of the draft articles by the Commission as well as by the Drafting Committee.

2. In the ensuing discussion of the draft articles, the text of each article as adopted on first reading 1/ is presented at the outset, followed by the text recommended by the Special Rapporteur for consideration, in cases where there is such a recommended text, and thereafter by commentary including a summary of the relevant views of States and of members as well as recommendations of the Special Rapporteur.

1/ See Yearbook of the International Law Commission, 1986, vol. II (Part Two), pp. 8-22, document A/41/10, chap. II.D.

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SPECIFIC COMMENTS

PART I

INTRODUCTION

Article 1

Scope of the present articles

Text adopted on first reading

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Text recommended by the Special Rapporteur

The present articles apply to the immunity of one State and its property from the jurisdiction and measures of constraint before the courts of another State.

Commentary

(1) One Government suggested in its written comment that the principle of immunity of a sovereign State contained in article 6 should be placed at the outset of the present articles. One member of the Commission suggested that article 6 should be placed immediately after article 1. The Special Rapporteur is however of the view that article 1 was intended to indicate the scope of the present articles as an introductory clause. He also prefers that the position of article 6 should not be too far removed from articles 11 to 19 which are limitations or exceptions to the principle of immunity contained in article 6. There appears to be general support for the original formulation in the Commission as far as the placement of the article is concerned.

(2) The draft article adopted on first reading refers only to immunity from jurisdiction and not to that from measures of constraint. This is presumably a result of the fact that when article 1 was adopted on first reading it was still uncertain whether the present articles would cover the question of immunity from measures of constraint. While the subject requires substantive and detailed discussion, the general tendency might be to include some articles on immunity from measures of constraint in part IV. Accordingly, reference to immunity "from measures of constraint" has been added in the draft recommended by the Special Rapporteur.

Articles 2 and 3

Text adopted on first reading

Article 2

Use of terms

1. For the purposes of the present articles:

(a) "court" means any organ of the State, however named, entitled to exercise judicial functions;

(b) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3

Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(a) the State and its various organs of government;

(b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(d) representatives of the State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Combined text recommended by the Special Rapporteur

Article 2

Use of terms

*1. 2/ For the purposes of the present articles:

*(a) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(b) "State" means:

(i) the State and its various organs of government;

(i bis) constituent States of a federal State, if the latter declares that its constituent States may invoke the provisions of the present articles applicable to a State and accepts the corresponding obligations;

(ii) political subdivisions of the State, other than the federal State, which are entitled to perform acts in the exercise of sovereign authority of the State; 3/

2/ Those parts of the texts recommended by the Special Rapporteur that are identical to the corresponding parts of the texts adopted on first reading (i.e., for which there are no recommended changes) are indicated by an asterisk (*).

3/ Relevant national legislations provide as follows:

(1) The State Immunity Act 1982 (Canada), S2:

"foreign State" includes:

"...

"(b) any government of the foreign State or of any political subdivision of the foreign State, including any of its departments, and any agency of the foreign State, and

(iii) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of sovereign authority of the State, provided that they do not include any entity established by the State for the purpose of performing commercial transactions, which has an independent legal personality and is capable of suing or being sued;

(iv) representatives of a State acting in that capacity;

(continued)

"(c) any political subdivision of the foreign State;

"'political subdivision' means a province, state or other like political subdivision of a foreign State that is a federal State."

(2) The Foreign Sovereign Immunity Act 1948 (Australia), S1 (4):

"A reference ... to a foreign State includes a reference to:

"(a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;"*

(3) The United States Foreign Sovereign Immunities Act of 1976, S.1603:

"(a) A 'foreign State' ... includes a political subdivision of a foreign State or ..."

(4) European Convention on State Immunity 1972, article 28:

"1. Without prejudice to the provision of article 27, the constituent states of a Federal State do not enjoy immunity.

"2. However, a Federal State Party ... may ... declare that its constituent states may invoke the provisions of the convention applicable to Contracting States, and have the same obligations."

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* In subclause (4), political subdivisions or component units (e.g., the provinces of Canada, the Swiss cantons) are included in the definition of "foreign State". The effect is to extend the immunities to these bodies, thus assisting Australian states to claim reciprocal treatment abroad (Australian Law Reform Commission report, at p. 41).

(c) "commercial transaction" means:

(i) any contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial or industrial, trading or professional nature, but not including a contract of employment of persons.

*2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

3. In determining whether a transaction coming under paragraph 1 (c) of this article is commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State are not precluded from taking into account the governmental purpose of the transaction.

Commentary

(1) The proposal to combine articles 2 and 3 was generally supported in the Commission, as well as in the Sixth Committee.

(2) With respect to paragraph 1 (a), where reference is made to "court" the term should be interpreted to include "appellate court". It should also be understood that the term "proceeding" does not include criminal proceedings.

(3) Some Governments expressed the view in their written comments as well as in the statements in the Sixth Committee that the words "judicial functions" should be explained more fully in the article. However, the Special Rapporteur still tends to the view that, since judicial functions vary under different constitutional and legal systems, it would be difficult to define the term in more detail in such a manner as to satisfy everyone. Nevertheless, he would be ready to discuss any concrete proposal on this point in the Drafting Committee.

(4) With respect to the definition of the term "State" in paragraph 1 (b), some members of the Commission considered that the constituent States of a federal State should be regarded as a State for the purpose of these articles. The Special Rapporteur submits, for the consideration of the interested members, a formulation based on article 28, paragraph 2, of the European Convention on State Immunity according to which "a federal State Party to the present Convention may, by notification addressed to the Secretary-General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligation."

(5) With respect to paragraph 1 (b) (iii), a proposal was made to the effect that State enterprises should be excluded from the category of agencies or instrumentalities. The same view was also expressed in the Sixth Committee, while some other delegations took an opposing view. In his proposal, the Special Rapporteur inserted in paragraph 1 (b) (iii) the wording "do not include any entity established by the State" in order to exclude State enterprises from the agencies or instrumentalities of a State. Since the point is related to the substance of article 11 bis, it is recommended that it be discussed in conjunction with that article.

(6) With respect to paragraph 1 (c), the use of the term "commercial transaction" in place of "commercial contract", which was used on first reading, is suggested by the Special Rapporteur in response to the preference for that change expressed by some members of the Commission and some delegations in the Sixth Committee. The definition of "commercial contract" in paragraph 1 (c) of the original article 2 appears to have been taken from the United Kingdom State Immunity Act, 3 (3), but whereas the United Kingdom Act uses the term "transaction" for the title, the Commission's draft uses the term "contract". The term "commercial contract", which is also used in articles 11, 11 bis and 19 of the draft adopted on first reading, could be changed to "commercial transaction" with little change in the substance of the present articles. 4/

(7) With respect to paragraph 3, a number of Governments favoured the primacy of the nature test, while others insisted upon the necessity of giving the same weight to both the nature and the purpose tests. In this connection, those members who supported the primacy of the nature test criticized, in particular, the part of

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4/ The relevant part of the United Kingdom State Immunity Act, S.3, is as follows:

"3. (1) A State is not immune as respects proceedings relating to:

"(a) a commercial transaction entered into by the State; or

"...

"(3) In this section 'commercial transaction' means:

"(a) any contract for supply of goods or services;

"(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or any other financial obligation; and

"(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority."

the draft adopted on first reading which contains the proviso "if, in the practice of that State, the purpose is relevant," as being subjective and ambiguous. On the other hand, the compromise proposal submitted by the Special Rapporteur to the forty-first session of the Commission which provided that purpose may be taken into account "if an international agreement ... or a written contract ... stipulates that the contract is for a public governmental purpose" was also criticized as being too rigid. A number of members however accepted this compromise.

(8) In view of the above situation the Special Rapporteur, taking into account a proposal made by one delegation in the Sixth Committee, would like to suggest another compromise to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, the court of a forum State should be free to take a governmental purpose into account also. Paragraph 3 recommended by the Special Rapporteur contains such a formulation. It has been suggested that the necessity to take into account the public purpose of the transaction arises from the consideration to provide for the case of famine or similar unforeseen situations. The Special Rapporteur considers that, in view of criticisms of the existing formula, it might be more advantageous, for purposes of flexibility, to give the power of discretion to the court of the forum State rather than to specify the special circumstances.

Article 4

Privileges and immunities not affected by the present articles

Text adopted on first reading

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae.

Text recommended by the Special Rapporteur

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

*(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

*(b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State, heads of Government and Ministers for Foreign Affairs.

Commentary

(1) The phrase "under international law" in the opening section of paragraph 1 has been inserted in accordance with the proposal of one Government in its written comment.

(2) Another Government proposed in its written comment that the last part of paragraph 2 read as follows: "... to heads of State, heads of Government, Ministers for Foreign Affairs and persons of high rank." The same proposal was repeated in the Commission as well as in the Sixth Committee. The idea may have been taken from article 21 of the Convention on Special Missions 5/ which provides for privileges and immunities and other facilities to be accorded to heads of State, heads of Government, Ministers for Foreign Affairs and persons of high rank when they take part in special missions. It is not very clear whether under customary rules of international law heads of Government and foreign ministers enjoy the same privileges and immunities as do heads of State. The Special Rapporteur is prepared to accept a majority view on this point. However, he hesitates to do so regarding "persons of high rank", since there are no generally accepted criteria for determining whether a person is of high or ordinary rank and as a result some difficulties might arise in the provision's application. Therefore, only the words "heads of Government and Ministers for Foreign Affairs" were added in paragraph 2.

Article 5

Non-retroactivity of the present articles

Text adopted on first reading

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

5/ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 30 (A/7630), p. 99.

Commentary

(1) One Government proposed in its written comment the inclusion of an optional clause allowing the present articles to be applicable with regard to any cause of action arising within, e.g., six years preceding the entry into force of the articles between the parties concerned. Another Government supported the retroactive application of certain articles. According to the present formulation, the principle of non-retroactivity will apply to proceedings instituted prior to the entry into force of the articles between the States concerned. The Special Rapporteur would like to obtain further views from members before accepting any of the above proposals for changes in the draft article adopted on first reading.

PART II

GENERAL PRINCIPLES

Article 6

State immunity

Text adopted on first reading

> A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

Text recommended by the Special Rapporteur

> A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles.

Commentary

(1) It is no secret that the views of Governments as well as those of members of the Commission have been divided between those which in theory favour the principle of absolute immunity and those which in theory favour that of restrictive immunity. Nevertheless, thanks to the tacit understanding among members that the Commission should undertake the second reading without once again entering into a doctrinal debate, the issue concerning article 6 has been reduced to the treatment of the bracketed phrase. Some members favoured its retention in order to maintain sufficient flexibility for the future development of State practice and the rules of general international law, while some other members felt that such a reference would encourage the unilateral interpretation of international law by local courts and lead to the erosion of the principle of State immunity. The Special Rapporteur is of the view that the purpose of the present articles should be to reach agreement on precisely the areas in which State immunity should and should not apply. If the reference to "general international law" remained, there would be a danger that the agreed articles might be subject to unilateral interpretation by

local courts. Accordingly, in his preliminary report he proposed the deletion of the bracketed phrase from the article.

(2) However, in order to accommodate the position of those members who insisted upon the need to provide for the further development of State practice and international law, the Special Rapporteur suggested in his preliminary report the inclusion of the following phrase in the preamble, should the present articles become a draft convention:

> "Affirming that the rules of general international law continue to govern questions not expressly regulated in this Convention".

The above suggestion received the support of some members of the Commission as well as some delegations in the Sixth Committee.

(3) The Special Rapporteur in his second report also suggested another alternative, namely, the addition of an article 6 bis providing for an optional declaration regarding exceptions to immunity which would apply between parties that did not raise objections to such a declaration. The suggestion was criticized as creating a multiplicity of régimes and, thereby, uncertainty. In the light of those objections, the proposed article 6 bis was withdrawn. Although substantial differences in views still remain, the Special Rapporteur submits for the consideration of the Commission a draft of the article in which the bracketed phrase has been deleted.

Article 7

Modalities for [Modes of] giving effect to State immunity

Text adopted on first reading

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Text recommended by the Special Rapporteur

1. A forum State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its court against a foreign State.

2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel the foreign State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of the foreign State.

3. In particular, a proceeding before a court of a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against any organ or other entity of a State or its representative referred to in article 3, paragraph 1.

Commentary

(1) Regarding paragraphs 1 and 2, drafting changes have been made pursuant to the suggestion of a Government in its written comment that the words "a State" be changed to "a forum State" and that "another State" or "other State" be changed to "a foreign State". The words "in a forum State", which appeared in the draft article recommended by the Special Rapporteur in his preliminary report, have also been deleted.

(2) With respect to paragraph 3, the proposed draft has been considerably shortened from the original paragraph in order to avoid duplication with article 2, paragraph 1 (b). The final portion of paragraph 3, starting with the words "or when the proceeding is designed to deprive" has also been deleted in order to avoid duplication with paragraph 2.

(3) The suggestion was made by one member that the words "interests" and "control" should be replaced by more commonly used legal terms. Although those words may not be used very frequently or may be used with slightly different meanings outside the common law countries, it would be difficult in fact to find suitable alternatives. As a result of the aforementioned deletion of the final portion of paragraph 3, the problem concerning "control" no longer exists as far as the present article is concerned. Although the reservation on the part of the members not belonging to the common law system concerning the use of the word "interests" is understandable, it would be difficult to avoid using it entirely in the present articles.

Article 8

Express consent to exercise of jurisdiction

Text adopted on first reading

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

Text recommended by the Special Rapporteur

1. A foreign State cannot invoke immunity from jurisdiction in a proceeding before a court of a forum State with regard to any matter if the foreign State has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

*(a) by international agreement;

*(b) in a written contract; or

(c) by a written express consent given after a dispute between the parties has arisen.

2. An agreement by one State concerning application of the law of another State shall not be interpreted as the consent of the former State to the exercise of jurisdiction by the court of the latter State.

Commentary

(1) In the chapeau, a drafting amendment was made whereby the words "a State" and "another State" were replaced by "a foreign State" and "a forum State", respectively. Subparagraph (c) was changed to a less strict formula, taking into account the views expressed by two Governments in their written comments.

(2) The new paragraph 2 was added in order to make it clear that an agreement made by one State concerning the application of the law of another State on a certain subject does not necessarily signify an agreement to the exercise of jurisdiction by the court of the latter State.

Article 9

Effect of participation in a proceeding before a court

Text adopted on first reading

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or

(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Text recommended by the Special Rapporteur

1. A foreign State cannot invoke immunity from jurisdiction in a proceeding before a court of a forum State if the foreign State has:

*(a) itself instituted that proceeding; or

(b) intervened in that proceeding or taken any other step relating to the merits thereof. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on these facts provided it does so before the court of first instance decides on the merits of the case [at the earliest possible moment].

*2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

*(a) invoking immunity; or

*(b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a foreign State before a court of the forum State as a witness does not affect the immunity of the State from the jurisdiction of that court.

4. Failure on the part of the foreign State to enter an appearance in a proceeding before a court of the forum State shall not be considered as consent by the foreign State to the exercise of jurisdiction by that court.

Commentary

(1) In the chapeau of paragraph 1, the same drafting changes have been made as were made in articles 7 and 8, namely, the replacement of the terms "a State" and "another State" by "a foreign State" and "a forum State".

(2) With regard to paragraph 1 (b), the new sentence beginning with the words "However, if the State ..." is intended to offer the possibility of claiming immunity in cases where a State has taken a step relating to the merits of a proceeding before it acquires knowledge of facts on which a claim to immunity might be based. This proposal was originally contained among written comments from Governments and was supported by a number of members of the Commission.

(3) In connection with paragraph 3, a proposal was made by some members along the same lines but of a broader scope, namely, to add the words "appearance in performance of the duty of affording the protection". In the opinion of the Special Rapporteur, the phrase "affording protection" could be interpreted much more broadly than could "appearance ... as a witness" and could thereby allow the foreign State to intervene in the proceeding too easily without losing immunity. He has therefore chosen to retain the present narrower formulation pending the expression of further views on the matter.

Article 10

Counter-claims

Text adopted on first reading

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

Commentary

(1) Among the written comments received, one Government proposed the addition of an article to the effect that a counter-claim unrelated to the principal claim may be presented against the foreign State but the counter-claimant cannot recover the amount exceeding the principal claim.

(2) The Special Rapporteur had earlier been in agreement with the above proposition, and had proposed an additional paragraph 4 which reads as follows: "A State can invoke immunity from jurisdiction if, and to the extent that, the claim or counter-claim against it seeks relief exceeding in amount or differing in kind from that sought by that State itself." However, after having given more thought to the question, he is now inclined to feel that more guidance on policy might be desirable from the Commission.

(3) According to the common law concept, it would appear that the foreign State is subject to any counter-claim arising from the same transaction provided that the counter-claimant is properly joined to the action. Under paragraph 1, a State cannot invoke immunity against a counter-claim if the State itself instituted the proceeding; under paragraph 2, a State cannot invoke immunity against a counter-claim if the State intervened in the proceeding to present a claim. These two provisions assume that the counter-claim arises out of the same original transaction, namely, the same legal relationship as the principal claim. In this connection the common law cases seem to suggest that even where counter-claims are allowed the counter-claimant cannot recover from the foreign State any amount by which the counter-claim exceeds the original claim. Paragraphs 1 and 2 do not impose such a limitation, in so far as the counter-claim arises from the same legal relationship as its principal claim.

(4) The United States Foreign Sovereign Immunity Act of 1976 (S.1607 (b) and 9 (c)) provides for no limit if the counter-claim arises out of the same legal relationship. According to the Act, counter-claims not arising from the same legal relationship may be brought in the same proceeding against the foreign State provided that the recovery on that claim when raised as a counter-claim is limited to a set-off against any recovery in the initial action. It is explained that the limit of the recovery on the counter-claim is not the amount claimed but the amount awarded.

(5) Therefore, before entering into the drafting of an additional paragraph such as the proposed paragraph 4 mentioned above, it is requested that guidance be given as to (a) whether in the case of paragraphs 1 and 2 a counter-claim may be allowed without limit if it arises from the same legal relationship and (b) whether the counter-claim may be allowed also in respect of a claim unrelated to the principal claim provided that the recovery is limited to a set-off against the principal claim.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Commentary

(1) With regard to the title of part III, the Special Rapporteur wishes to know if there would be any support for a neutral formulation such as "activities of States to which immunity does not apply" or, as suggested by one member, "cases in which State immunity may not be invoked before the court of another State". If such is not the case, it is suggested that the subject be left open for decision at the conclusion of the consideration of the present articles.

Article 11

Commercial contracts

Text adopted on first reading

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

Text recommended by the Special Rapporteur

Article 11

Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from the exercise of that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(a) in the case of a commercial transaction which took place between States or on a Government-to-Government basis;

(b) if the parties to the commercial transaction have otherwise expressly agreed.

Commentary

(1) One member suggested the insertion of the phrase "unless otherwise agreed between the States concerned" at the beginning of paragraph 1, as in articles 12 to 18. In view of the basic nature of the present rule, however, it does not seem desirable to add the phrase, as it might unnecessarily encourage deviation from the basic rule by way of regional agreement or written contract.

(2) Another member pointed out the necessity of clarifying that an agreement in a contract that it was to be governed by the law of another State was not to be deemed as submission to the jurisdiction of that State. This would be taken care of if the addition of article 8, paragraph 2, were to be approved.

(3) With regard to the phrase "by virtue of the applicable rules of private international law" in paragraph 1, a number of members pronounced themselves in favour of a rule pertaining to the jurisdictional link between a dispute arising from the transaction and the forum State. The Special Rapporteur was however of the view that, since there were differences between solutions contained in various national and international instruments, the unification of the rules of private international law would be extremely difficult. The rule of a State concerning the territorial link for exercising jurisdiction may variously be the place of conclusion of the contract, the place where obligations under the contract are to be performed or the nationality or place of business of one or more of the contracting parties. The formula "by virtue of the applicable rules of private international law" would be sufficiently neutral to enable the local court to determine under its own rules a jurisdictional link as appropriate between a particular commercial transaction and a forum State. The selection of any particular rule concerning the territorial link might create an unnecessary obstacle to the acceptance by States of the present articles as a whole.

Article 11 bis

State enterprises

If a State enterprise engages in a commercial transaction with a foreign natural or juridical person, the State enterprise is subject, in respect of differences relating to the commercial transaction, to the same rules and liabilities as applicable to a natural or juridical person, and that State may invoke immunity from jurisdiction of the court of the forum State in respect of that commercial transaction. However, if a State enterprise engages in the commercial transaction on behalf of a State, article 11 shall apply.

Commentary

(1) The Special Rapporteur has reformulated the text of the article submitted at the preceding session taking into account the views expressed in the Commission. According to article 2, paragraph 1 (b) (iii), a State enterprise is not to be included in the agencies or instrumentalities of a State. The article provides, therefore, that a State enterprise is subject to the same rules and liabilities as applicable to a natural or juridical person and therefore cannot invoke immunity from jurisdiction of the court of the forum State, while the State which established the State enterprise may invoke immunity from jurisdiction of the local court in respect of the commercial transaction performed by the State enterprise. In other words, the State cannot be sued, in principle, by the court of a forum State in relation to a commercial transaction performed by the State enterprise.

(2) However, if the State enterprise enters into and performs a commercial transaction on behalf of the State, article 11 will apply and the State cannot invoke jurisdiction in respect of that commercial transaction. Some members expressed the view that a State enterprise does not engage in a commercial transaction on behalf of a State. However, sometimes a State enterprise under the directive of a higher body (for example, a ministry) may conclude a commercial contract on behalf of the Government or execute a particular commercial transaction as the alter ego, so to speak, of the State. In such a case the commercial transaction may be regarded as the transaction between the State and a foreign natural or juridical person and the provisions of article 11 will apply. Of course, there is still room for a court of the forum State to take into account the purpose of the transaction in deciding whether that transaction is commercial under article 2, paragraph 3.

Article 12

Contracts of employment

Text adopted on first reading

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Text recommended by the Special Rapporteur

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State [and is covered by the social security provisions which may be in force in that other State].

2. Paragraph 1 does not apply if:

[(a) the employee has been recruited to perform services associated with the exercise of governmental authority;]

[alternatively: (a) the employee is administrative or technical staff of a diplomatic or consular mission who is associated with the exercise of governmental authority;]

(b) the proceeding relates to the [recruitment,] renewal of employment or reinstatement of an individual;

*(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

*(d) the employee is a national of the employer State at the time the proceeding is instituted;

*(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Commentary

(1) Divergent views were expressed with regard to the article. One Government in its written comments as well as some members of the Commission and some delegations in the Sixth Committee suggested that the entire article be deleted. Others, however, considered the article necessary since a local court is

a convenient forum in which to provide protection to the employee of a State. Nor is there uniformity among domestic legislations. The United Kingdom State Immunity Act 1978, section 4, contains detailed provisions on the subject-matter, which are followed closely in the State Immunity Act 1979 of Singapore and The State Immunity Ordinance 1981 of Pakistan, while the United States Foreign Sovereign Immunities Act and the State Immunity Act of Canada contain no such provisions. The European Convention on State Immunity of 1972 also contains detailed provisions in its article 5. All of these provisions are rather complex. The present draft of article 12 probably takes into account the United Kingdom 1978 Act and the 1972 European Convention on State Immunity. 6/

(2) The Special Rapporteur suggested the deletion of the reference to the social security requirement since not all States have a social security system. Several members supported the deletion, while others preferred that the reference be retained.

(3) The Special Rapporteur also suggested that subparagraphs (a) and (b) of paragraph 2 be deleted, since according to subparagraph (d) the employer State may invoke immunity from the court if the employee is its own national and it would be rather unusual to recruit a person who is not its national to the position associated with the exercise of governmental authority. However, he now holds the view that subparagraph (a) also has the effect of excluding administrative or technical staff of a mission from the application of paragraph 1, the effect of which may not be achieved under article 4. Accordingly, he offers alternative (a) within brackets for consideration.

(4) As to the deletion of subparagraph (b), it would appear that, if immunity can be invoked before the proceeding of the court relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court. One delegation in the Sixth Committee raised the question of the adequacy of the word "recruitment", and felt that it might better be replaced by "appointment". In any event, the Special Rapporteur would keep the matter open pending further discussion.

6/ The relevant legislations:

(1) European Convention on State Immunity, article 5:

"1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum."

(2) United Kingdom State Immunity Act:

"4. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there."

Article 13

Personal injuries and damage to property

Text adopted on first reading

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Commentary

(1) Views of members were divided on this article also. Some members of the Commission proposed the deletion of the entire article, since in their view it was based on the legislation of a few States and such cases could be settled through the diplomatic channel, while some others held the view that disputes of this nature were not uncommon and diplomatic protection was not a viable alternative. It was also pointed out that, if the act or omission which caused the injury or damage was attributable to a State, the question of State responsibility would arise and the matter could be resolved only by international law and not by a national court.

(2) In the light of such differences of view, the Special Rapporteur made three suggestions. First, he suggested the addition of a new paragraph which would read: "Paragraph 1 does not affect any rules concerning State responsibility under international law." Although there was no opposition to this suggestion in the Commission, no clear support was expressed for it either. Secondly, he suggested that the phrase "if the author of the act or omission was present in that territory at the time of the act or omission" be deleted from the original text in order to extend the scope of the article to transboundary damage. Some members expressed reservations with regard to this deletion. Thirdly, the Special Rapporteur suggested that the application of the article be limited mainly to pecuniary compensation arising from traffic accidents involving State-owned or State-operated means of transport and occurring within the territory of the forum State. The views of members were divided on this point, and it was also remarked that the general practice was to settle the matter through insurance, although it was pointed out that insurance did not always cover the full risk involved.

(3) In the light of these preliminary reactions, the Special Rapporteur submits the original version without changes.

Article 14

Ownership, possession and use of property

Text adopted on first reading

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of a State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest, if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by prima facie evidence.

Suggestion by the Special Rapporteur

(1) Among the written comments the view was expressed that the scope of the present draft article was too broad. In the Commission doubts were expressed as to whether paragraph 1 (c), (d) and (e) reflected universal practice. Taking into account these views, the Special Rapporteur suggests that the Commission consider the advisability of deleting subparagraphs (c), (d) and (e) which represent mainly the practice of common law countries.

Article 15

Patents, trade marks and intellectual or industrial property

Text adopted on first reading

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Text recommended by the Special Rapporteur

Unless otherwise agreed between the States concerned, the immunity of a foreign State cannot be invoked before a court of the forum State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the foreign State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, including a plant breeder's right and a right in computer-generated works which enjoys a measure of legal protection, even if provisional, in the forum State; or

*(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Commentary

(1) One Government in its written comment requested the addition of a plant breeder's right. With a view to meeting that request, the phrase "any other form of intellectual or industrial property, including a plant breeder's right" was added to subparagraph (a). The term "right in computer-generated works" is to be understood to include, inter alia, computer programming and semiconductor chip layouts.

Article 16

Fiscal matters

Text adopted on first reading

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Text recommended by the Special Rapporteur

The only change recommended by the Special Rapporteur would be the substitution, as in the previous article, of the words "foreign State" and "the forum State" for "a State" and "another State", respectively.

Commentary

(1) No question of substance has been raised concerning the article. One proposal was made to redraft the article along the lines of article 29 of the European Convention on State Immunity, to the effect that "the present articles do not apply to proceedings concerning customs duties, taxes or penalties". Although the Special Rapporteur has no objection to such a redrafting, he wishes to keep the matter open pending further discussion in the plenary as well as in the Drafting Committee.

Article 17

Participation in companies or other collective bodies

Text adopted on first reading

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Text recommended by the Special Rapporteur

The Special Rapporteur would once again recommend only that the words "a State" and "another State" in paragraph 1 be substituted by "a foreign State" and "the forum State" respectively, and that the phrase "that State" in paragraph 1 (b) be changed to "the foreign State".

Commentary

(1) No substantive objections were raised with regard to the above text. One Government proposed in its written comment that the requirement that the collective body have "its principal place of business" in the forum State should be given preference over the other criteria. Another Government proposed that the words "participation" and "participants" be replaced by "membership" and "members" respectively. The Special Rapporteur wishes to retain the draft without changes (except minor drafting suggestions indicated in brackets) pending its further consideration in the Drafting Committee.

Article 18

State-owned or State-operated ships engaged in commercial service

Text adopted on first reading

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purpose of this article, the expression "proceeding relating to operation of that ship" shall mean, inter alia, any proceeding involving the determination of:

(a) a claim in respect of a collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Text recommended by the Special Rapporteur

The Special Rapporteur recommends no change other than the deletion of [non-governmental] in paragraphs 1 and 4.

Commentary

(1) A number of Governments in their written comments proposed the deletion of the word "non-governmental" in paragraphs 1 and 4. The Special Rapporteur also felt that its use in those paragraphs would render their meaning ambiguous and might represent a departure from the practice followed in a number of treaties related to the law of the sea, including, inter alia, the 1926 Brussels Convention concerning State-owned vessels, the 1958 Geneva Convention on the Territorial Sea, the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1982 United Nations Convention on the Law of the Sea. 7/ Therefore, although a few members still held the view that "non-governmental" should be retained without brackets, the general trend in the Commission appears to be in favour of its deletion.

(2) Two Governments suggested the introduction of the concept of segregated State property relating to State-owned or State-operated ships engaged in commercial service. However, the Special Rapporteur is inclined to the opinion, shared by some other members, that the Commission should be careful to avoid unnecessary duplication, in particular between article 11 bis and the present article.

7/ The relevant legislations:

(3) As to the question of State-owned or State-operated aircraft engaged in commercial service, the Special Rapporteur suggested that this question could be more suitably covered in the commentary rather than by an additional provision. 8/ No objection was raised with regard to this suggestion.

(continued)

(1) International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels*

"Article 3

"§1. The provisions of the two preceding articles shall not be applicable to ships of war, government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem."

(2) Convention on the Territorial Sea and the Contiguous Zone, 1958†

"Article 21

"The rules contained in subsections A and B shall also apply to government ships operated for commercial purposes."

(3) International Convention on Civil Liability for Oil Pollution Damage‡

"ARTICLE XI

"1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

"2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State."

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* League of Nations, Treaty Series, vol. CLXXVI, p. 200.

† United Nations, Treaty Series, vol. 516, No. I-7477.

‡ International Legal Materials. vol. 9, p. 45.

8/ See A/CN.4/422/Add.1 and Corr.1, para. 6.

Article 19

Effect of an arbitration agreement

Text adopted on first reading

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award, unless the arbitration agreement otherwise provides.

Text recommended by the Special Rapporteur

The Special Rapporteur recommends no change other than the addition of the phrase "(d) the recognition of the award" (see para. 2 of commentary).

(continued)

(4) United Nations Convention on the Law of the Sea[§]

"Article 31

"Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes

"The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law."

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§ Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), Documents of the Conference, document A/CONF.62/L.122.

Commentary

(1) There are three points, two of which were raised in the plenary meeting of the Commission (see A/CN.4/422/Add.1, paras. 7-15), on which the Special Rapporteur would like to learn the views of members. First, the views were divided as to the choice between the bracketed terms [commercial contract] and [civil or commercial matter] in the chapeau of the article. If in article 2 (Use of terms) the term "commercial transaction" were used instead of "commercial contract", the same change might also be made in the present article. Even in such a case, some members might still prefer the term "commercial contract". Whichever the preference, the Special Rapporteur holds the view that there would be little reason to limit the supervisory jurisdiction of a court of a forum State to either a "commercial contract" or a "commercial transaction", since the scope of an arbitration depends primarily on the terms of the arbitration agreement. Again, there are a number of arbitration cases arising out of civil or commercial matters. The last part of the article, which reads "unless the arbitration agreement otherwise provides", indicates that if the parties to the agreement wish to limit the scope of arbitration to differences arising out of a commercial contract they can do so by inserting a provision to that effect in the arbitration agreement. Therefore, the Special Rapporteur prefers to leave open the possibility of choosing the alternative "civil or commercial matter".

(2) The second point has to do with the wording of subparagraph (c), for which one Government proposed adding "recognition and enforcement" of the arbitral award. However, since the question of "measures of constraint" is to be treated in part IV of the present draft articles, the Special Rapporteur would suggest that in the present article only "(d) the recognition of the award" should be added. In this connection, the Special Rapporteur followed the interpretation of "recognition" as the act which entails "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate". 9/ On the other hand, under a different interpretation of recognition, "an application for enforcement serves no useful purpose except as a first step towards execution". 10/ If the latter interpretation prevails in the Commission, the above proposal may have to be reconsidered.

(3) The third point is that, while the Commission had considered on first reading two alternatives for the last part of the chapeau, namely, "before a court of another State which is otherwise competent", or "a court of another State in the

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9/ F. A. Mann, "State contract and international arbitration", British Yearbook of International Law, vol. 42 (1967), p. 18; see also A/CN.4/422/Add.1 and Corr.1, para. 13.

10/ See A/CN.4/422/Add.1 and Corr.1, para. 14.

territory or according to the law of which the arbitration has taken or will take place", and had chosen the former, the present Special Rapporteur is of the opinion that the latter formula, which is that adopted in article 12 of the European Convention on State Immunity of 1972, 11/ may have some merits as far as arbitration procedure is concerned. He would therefore recommend that members devote further consideration to this point.

Article 20

Cases of nationalization

Text adopted on first reading

> The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

Commentary

(1) The article emerged during first reading as a general reservation clause. Some members stated that measures of nationalization, as sovereign acts, were not subject to jurisdiction before the court of another State. However, a number of members commented that the meaning and the proper scope of the article were unclear. On first reading some members suggested that it be placed in part I, but the Special Rapporteur felt that this might give the article undue weight, since the territorial effects of nationalization was not a subject on which the Commission was expected to express an opinion. Many members were in favour of deleting the article. Accordingly, the Special Rapporteur recommends that it be deleted.

11/ Article 12 of the 1972 European Convention reads as follows:

"1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award, unless the arbitration agreement otherwise provides.

"2. Paragraph 1 shall not apply to an arbitration agreement between States."

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT*

Text adopted on first reading and to be used as the first alternative†

Article 21

State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22

Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

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* Part IV (articles 21-23) is dealt with here as a whole.

† See paragraph 5 of the commentary.

Article 23

Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21:

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

Text submitted by the Special Rapporteur as the second alternative

Article 21

State immunity from measures of constraint

1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a foreign State may be taken in the territory of a forum State unless and to the extent that:

(a) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated:

(i) by arbitration agreement;

(ii) by international agreement or in a written contract;

(iii) by a written consent given after a dispute between the parties has arisen; or

(b) the foreign State has allocated or earmarked its property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is in the territory of the forum State and is specifically in use or intended for use by the State for commercial [non-governmental] purposes [and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed].

*2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 22 (originally article 23)

Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 21:

*(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

*(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the foreign State which is in the territory of a forum State and used for monetary purposes;

*(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

*(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of a forum State unless the State in question has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under paragraph 1 (a) of article 21, or allocated or earmarked that property within the meaning of paragraph 1 (b) of the same article.

Article 23

If a State property including a segregated State property is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of constraint before the court of a forum State in respect of that State property.

Commentary

(1) There had previously been a general tendency to consider separately the questions of immunity from measures of constraint and immunity from jurisdiction, thereby leading to the independent development of the two subjects. Consequently, while there was a trend, in particular among the industrialized countries, towards restrictive immunity as far as the jurisdiction of a court of the forum State was concerned, two opposing views continued to coexist in the field of execution. According to one view, the power to proceed to execution was regarded as the consequence of the power to exercise jurisdiction, while under the opposing view international law prohibited forced execution on the property of a foreign State situated in a forum State, even where a court of the forum State had jurisdiction to adjudicate over the dispute. Among the relevant cases, the courts of Switzerland, the Netherlands and the Federal Republic of Germany held the former view, while a number of socialist Governments were inclined to the latter view. However, the tendency has been emerging recently among developed countries to restrict immunity from execution subject to certain safeguards for protected State property.

(2) An example of this trend is the United Kingdom Sovereign Immunity Act, S.13, which has served as a model also for the domestic legislation of South Africa, Singapore, Pakistan and, more recently, Australia. Under this system, provision is made for the enforcement of a judgement or an arbitral award in respect of State property which is for the time being in use or is intended to be used for commercial purposes. Another group of recent enactments along these lines, but which differs slightly from the above, is represented by the United States Act S.1609 which, while setting up a general rule of immunity from execution, provides for a number of exceptions to the effect that property used for a commercial activity in the United States is subject to execution. The main difference between the two systems is that, while under the United Kingdom Sovereign Immunity Act a waiver can apply to non-commercial as well as commercial property, under the United States Foreign Sovereign Immunities Act a waiver is only possible in respect of commercial property.

(3) The 1972 European Convention on State Immunity is a rather complex system. Although the basic rule underlying it is the general prohibition of enforcement measures subject to the possibility of express waiver, the Convention does provide for the direct obligation of contracting States to abide by a judgement rendered against them. In case of non-compliance, the plaintiff may institute proceedings before the court of the State against which the judgement has been rendered, and there is the further possibility of bringing an action before the European Special Tribunal. Still another possibility is the procedure of optional declaration, according to which judgements in cases arising from industrial or commercial activities may be enforced against the property of a debtor State that is used exclusively for such activities. With regard to the procedure laid down in the Convention, one writer has commented "that the model presented by the Convention must be seen as a compromise between countries with widely differing attitudes ... This solution does not commend itself for general use. It is based on a special confidence between the European countries parties to it which cannot be generalized." 12/ It may be the case that the procedure established in the European Convention is too complex to serve as a guide for the Commission.

(4) Once again, the views expressed by members of the Commission were squarely opposed. Two members said that the principle of prohibition to execute against the property of a foreign State should be made clear. Some of the Governments of the socialist States had stated the same view in their written comments. However, several Governments, in commenting on particular phrases, had indicated that they were not basically against the draft articles as adopted on first reading. In addition, one delegation expressed the concern in the Sixth Committee that the provisions on measures of constraint might make it impossible to execute in one State a judicial decision rendered against another State. On the other hand, another delegation favoured the reformulation of the draft article in such a manner as to make the principle of prohibition of execution against State property clear.

(5) With this background in mind, the Special Rapporteur suggests that the Committee proceed with the further consideration of the draft article based on two alternatives. The first would be the text as adopted on first reading, and the second would be a reformulation of the first alternative, but without the idea of total prohibition of execution, since it is the view of the Special Rapporteur, in the light of the written comments received so far as well as observations made in the Sixth Committee and in the Commission, that carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval. The Special Rapporteur has already commented on the first alternative in his two previous reports; 13/ his comments on the second alternative are set out below.

12/ C. Schreuer, State immunity: some recent developments (Cambridge, Grotius, 1988), p. 128.

13/ A/CN.4/415, pp. 111 and 118; A/CN.4/422 and Corr.1, paras. 26-28.

(6) Article 21 has taken into account the drafting suggestion of one member that the principle on measures of constraint be stated at the outset of part IV, as well as the suggestion by other members that the original articles 21 and 22 be combined into one article. The chapeau of paragraph 1 states the principle of non-execution against the property of a foreign State in the territory of a forum State with certain exceptions. The original text of the chapeau of article 21 and of paragraph 1 of article 22 contained the phrase [, or property in which it has a legally protected interest,], over which there were differences of view among members of the Commission. In their written submissions, a number of Governments criticized the phrase as being vague and permitting a broadening of the scope of immunity from execution. Although a few members favoured its retention, the Special Rapporteur recommends that it be deleted.

(7) Exceptions to the principle shall thus apply (a) if a foreign State expressly consented to such measures by agreement or contract (reference to arbitration agreement is made in paragraph 1 (a) (i), as arbitration seems to be one practical possibility); (b) if the foreign State has allocated or earmarked property for satisfaction of the claim; or (c) if the property is used for commercial purposes. The text of subparagraph 1 (c) was taken from the previous article 21 (a) but the word [non-governmental] has been deleted in conformity with paragraphs 1 and 4 of article 18, and the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" has been placed within square brackets, as views were divided with regard to it. In the light of the written comments from Governments, its deletion was proposed by the Special Rapporteur, but was opposed by some members. As to paragraph 2, its text is identical to that of the previous article 22.

(8) Only a few comments are necessary with regard to article 22, which is basically a reproduction of the previous article 23, with a few changes. The word [non-governmental] in the chapeau of paragraph 1 has been deleted for the same reason that it was deleted in articles 18 and 21. (The consequential change of reference in article 21 was from subparagraph (a) to (c).) The words "and used for monetary purposes" were added to paragraph 1 (c) as a result of the written comment of one Government. The consequential change in paragraph 2 is the reference to article 21 instead of 22.

(9) With regard to article 23, article 11 bis provides that if a State enterprise "engages in a commercial transaction with a foreign natural or juridical person, that State enterprise is subject ... to the same rules and liabilities as applicable to a natural or juridical person". This means also that, in respect of measures of constraint, the State enterprise is subject to the same rules and liabilities as applicable to a natural or juridical person. As the logical consequence of the above, article 23 provides that, if the State enterprise is entrusted with a State property for commercial purposes, the State to which that State enterprise belongs cannot invoke immunity from the measure of constraint before the court of the forum State in respect of that State property.

PART V

MISCELLANEOUS PROVISIONS

Article 24

Service of process

Text adopted on first reading

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Text recommended by the Special Rapporteur as the basis of consideration

*1. Service of process by writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(b) failing such a convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned.

2. Service of process referred to in paragraph 1 (b) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied [, if necessary,] by a translation into the official language, or one of the official languages, of the State concerned [, or at least by a translation into one of the official languages of the United Nations].

*4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Commentary

(1) Among the written comments submitted there were views that held that service of process should be deemed to have been effected by transmission to the Ministry of Foreign Affairs or that service of process should be effected through diplomatic channels. It was also pointed out that a special arrangement for the service of process between a claimant and the State would not be acceptable in many legal systems. In consideration of those views, in the new paragraph 1 the procedure for the service of process was changed to either that agreed in an international convention or transmission through diplomatic channels. In the case of the existence of a convention binding upon both the forum State and the State concerned, the service of process according to the convention should have priority.

(2) The change in paragraph 2 is simply the consequential change of paragraph reference.

(3) With regard to paragraph 3, several members commented that the phrase [, if necessary,] should be deleted. In view of the practical problems that would be encountered by the authority serving the process, if those words were deleted the Special Rapporteur would suggest the addition of the bracketed phrase indicated at the end of the paragraph so that, in cases where translation into a language which was not widely used might give rise to difficulties on the part of the authority serving the process, a translation into one of the official languages of the United Nations should be accepted.

Article 25

Default judgement

Text adopted on first reading

1. No default judgement shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgement rendered against a State, accompanied if necessary by translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgement set aside, which shall be not less than three months from the date on which the copy of the judgement is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Text recommended by the Special Rapporteur

The only change recommended by the Special Rapporteur is the addition at the end of paragraph 1 of the words "and if the court had jurisdiction in accordance with the present articles" (see para. 1 of commentary).

Commentary

(1) The concept embodied in the above suggested addition to the end of paragraph 1 was suggested by one Government in its written comments, in order to make it clear that the default judgement should not be rendered merely by virtue of due service of process. The same idea was expressed by another member in the Commission. The Special Rapporteur has no objection to this addition if the other members so concur.

(2) Some members suggested the deletion of the words "if necessary" from paragraph 2 as in the case of paragraph 3 of article 24. It is suggested that the same solution be adopted as was done with respect to that article.

Article 26

Immunity from measures of coercion

Text adopted on first reading

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Commentary

(1) The Special Rapporteur has no further suggestion to make with regard to the article. Two Governments in their written comments expressed doubts as to the appropriateness of the provision. However, one other Government, while endorsing the objective of the provision, suggested its reformulation to the effect that the possibility of issuing such an order itself should be prevented. The Special Rapporteur prefers to keep the original formulation but would like to learn the views of other members.

Article 27

Procedural immunities

Text adopted on first reading

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before the court of another State.

Text recommended by the Special Rapporteur as the basis for consideration

*1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State which is a defendant in a proceeding before a court of another State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Commentary

(1) Among the written comments submitted, two Governments expressed the view that the provision on non-requirement of security should be amended to apply only to the defendant State, and suggested the reformulation of paragraph 2 based on that view. The reformulation was supported by one member but doubts were expressed with regard to it by some other members.

Article 28

Non-discrimination

Text adopted on first reading

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

Commentary

(1) During the discussion in the Commission, some members suggested its deletion, while some others supported its retention. Since the subject will require careful consideration after general agreement has been reached on the preceding articles, the Special Rapporteur would prefer to retain the article in its present form for the time being.